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IN THE

Supreme Court Of The United States

October Term, 1965

No. 289

EDYTHE YENOWINE,
ELSIE DENSMORE,
DONALD D. DENSMORE, and
DANIEL W. ROWE, Administrator of the
Estate of LILA CRAWFORD, Deceased, - Petitioners,

versus

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, - - - Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INSURANCE COMPANY - - - *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Under the terms of the policy sued on did the 1956 Plymouth automobile, which Petitioner Edythe Yenowine was driving on June 9, 1961, when she was involved in an accident, qualify as a "replacement" for the 1953 Plymouth which was "covered by the policy" so as to afford liability coverage to Yenowine for judgments obtained against her, as a result of the accident, by the other three petitioners?

Petitioners' Statement of the Questions Presented for Review (Petition pp. 2-3) does not present "questions" but arguments in support of their contentions and Respondent submits the question presented above fairly summarizes and delineates the issue now before this Court and is the real and decisive question which was presented, by Petitioners and Respondent, to the Court of Appeals and, in fact, is the same and only question presented by the pleadings in the District Court.

In the complaint filed, by Petitioner Yenowine, in the District Court (9a-10a) it is alleged, in part, that Yenowine "purchased said 1956 model Plymouth automobile and that said 1956 Plymouth automobile was to replace the 1953 Plymouth automobile owned by plaintiff and covered by said insurance policy." It was further alleged that said information, within 30 days from the date of acquisition of the 1956 Plymouth, was given to a "woman" in the office of one of Respondent's agents.

Respondent's Statement of Questions as presented in its original brief to the Court of Appeals was:

> "Did the 1956 Plymouth, which Plaintiff-Appellee Yenowine was driving on June 9, 1961 when she was involved in an accident, 'replace' the 1953 Plymouth 'covered by the policy' so as to afford coverage to Plaintiff-Appellee Yenowine for Judgments obtained against her by the Intervenors-Appellees?"

The only other question presented by Respondent in its original brief related to coverage C of the policy

sued on which provided for the payment of certain medical expenses subject, however, to an exclusion where the injured persons are in an automobile owned by the named insured and not covered in the insuring agreement, it being Respondent's contention that the 1956 Plymouth automobile was so owned by Yenowine who was the named insured.

The Petitioners' Counter-Statement of the Question involved as presented in their brief before the Court of Appeals was:

> "Did the 1956 Plymouth which Plaintiff-Appellee Yenowine was driving on June 9, 1961, when she was involved in an accident, in fact replace the 1953 Plymouth described in the policy so as to afford coverage to Plaintiff-Appellee Yenowine for Judgments obtained against her by the Intervenors-Appellees as well as coverage for medical expenses and the expense of defendant (sic) the State Court action incurred by her?"

Respondent, therefore, respectfully submits that its Statement of the Question presented to this Court fairly presents the present issue and that all other possible arguments or suggestions of questions are subsidiary to and only possible facets of, the real and controlling issue, namely, Whether the 1956 Plymouth, under the terms of the policy, in fact and in law, qualified as a "replacement" for the 1953 Plymouth which was "covered by the policy" sued on.

COUNTER-STATEMENT OF THE CASE

Petitioners do not contend that the Opinion of the Court of Appeals fails to correctly set forth the facts of the case and since Respondent believes that the Opinion states the pertinent facts, necessary to deciding the issue now before the Court on the Petition, Respondent will not again review the facts, the pertinent portions of which are in the Record now before the Court as found in the Appendices to the briefs of the parties filed with the Court of Appeals, and this Counter-Statement, therefore, will be devoted to correcting several inaccuracies in Petitioners' statement of the case as well as to demonstrate that certain portions of the factual statement are not relevant to any issue here involved.

On Page 15 of the Petition, it is stated that the District Court, in its instructions to the jury, defined "replacement" as follows:

> "A newly acquired automobile becomes a replacement as used in these instructions when it is acquired in fact as a replacement and the owner discards the old vehicle or retains the old vehicle not in working condition."

Respondent agrees that the Court's definition above is correct but Respondent did not agree that said instruction should be given to the jury nor agree that the case should be submitted to the jury on any theory but, on the contrary, made motions for a directed verdict at the conclusion of the plaintiff's and inter-

venors' proof and again at the conclusion of all of the proof.

Respondent again urged the Court in its Motion for Judgment Notwithstanding the Verdict (68a-71a) that the case should not have been submitted to the jury on any theory because, as a matter of law and fact, Petitioner Yenowine's 1956 Plymouth did not "replace" the 1953 Plymouth.

Petitioners, in their statement of the case on Pages 16 and 17 of the Petition, set forth nine factual circumstances which Petitioners claim constitute "a heaping amount of evidence in the Record to show that Petitioner Yenowine 'had discarded (or disposed of) the 1953 Plymouth.' "

Respondent calls the Court's attention to the fact that none of the factual circumstances alleged are in any way at variance with or militate against the Opinion of the Court of Appeals which states, in substance, (1) that the evidence is "undisputed" that at the time of the purchase of the 1955 Plymouth, which plaintiff purchased in August 1960, and again when the 1956 Plymouth was acquired on November 30, 1960, that the 1953 Plymouth which was covered by the policy, WAS NOT "incapable of further service," and (2) the 1953 Plymouth, at the pertinent times, was owned by Petitioner Yenowine and had not been disposed of by her.

The issue before the Court is controlled not by the condition of the 1953 Plymouth in June of 1961, when the accident occurred, but its condition at the

times both the 1955 and 1956 Plymouths were acquired. On each of these occasions Peititoner Yenowine admitted that the 1953 Plymouth was not only "in running order," (41a) but had actually been driven "some" until March of 1961 which was even after the 1956 Plymouth had been acquired (41a-42a).

REASONS WHY CERTIORARI SHOULD BE DENIED

1. COVERAGE WAS NOT AFFORDED TO PETITIONERS, UNDER THE "NEWLY ACQUIRED AUTOMOBILE" CLAUSE OF THE POLICY SUED ON, BECAUSE THE 1956 PLYMOUTH, INVOLVED IN THE ACCIDENT, DID NOT EITHER IN LAW OR IN FACT, "REPLACE" THE 1953 PLYMOUTH WHICH WAS "COVERED BY THE POLICY" AND WHICH WAS RETAINED BY THE POLICY-HOLDER, PETITIONER YENOWINE, "IN WORKING CONDITION."

This case involves the following provisions of the "Newly Acquired Automobile" clause of the policy, issued by Respondent to Petitioner Yenowine, which insured a 1953 Plymouth automobile:

> "(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the named insured, * * * if (a) it replaces an automobiled owned * * * and covered by this policy, or the company insures all automobiles owned by the named insured * * * on the date of its delivery, and (b) the named insured * * * notifies the company within thirty days following such delivery date * * *" (9a).

The Petitioners must first prove that the 1956 Plymouth automobile which was involved in the accident on June 9, 1961, qualified, under the above policy provision, as a "Newly Acquired Automobile."

There is no claim that Respondent insured all automobiles owned by the named insured, Edythe Yenowine, on the date that the 1956 Plymouth was delivered for the obvious reason that on the date of delivery of the 1956 Plymouth, the Petitioner Yenowine owned the 1953 Plymouth automobile which was "covered by this policy" and also owned a 1955 Plymouth which was insured for collision loss by another insurer, the Ohio Casualty Insurance Company (39a-40a).

Petitioners, therefore, must rely on their claim that the 1956 Plymouth replaced the 1953 Plymouth "covered by the policy."

One of the leading cases, which considers the replacement provision of the Newly Acquired Automobile clause, is *Micham* v. *Travelers Indemnity Co.*, 127 F. 2d 27 (1942), C.C.A. 4th Circuit, wherein Travelers' named insured, Gray, purchased and acquired title to a new Lincoln but did not trade in the Buick, which was covered by the policy, although he left the Buick with a motor company, from which he had purchased the Lincoln. Gray hoped that the Buick could be sold for $500.00, so that he could buy an automobile for his mother whose Ford car he used as a partial down payment for the Lincoln. He did not transfer title to the Buick which was covered under the Travelers policy. The Court held that the Lincoln

did not qualify under the Newly Acquired Automobile provision of Travelers' policy, and, therefore, no coverage was afforded to Gray for an accident which occurred while he was driving the Lincoln, and in so doing, stated: (p. 29 of the opinion).

> "The purpose of the insurer to cover only one car is correctly set out in this argument, but the factual situation does not support the appellant's contention. The evidence supports the finding of the District Judge that the Lincoln Zephyr did not in fact replace the Buick car. Gray still retained title to the Buick and full control over it. At any time he could have taken it from the custody of the Motor Company and put it into use; at any time the Motor Company was privileged to use the car on Gray's behalf in order to demonstrate it to a customer; *and in either case it would have been impossible for the company to show that the car was not still covered by the policy if an accident had occurred and liability on Gray's part had ensued.* These circumstances distinguish the case from Merchants Mutual Casualty Co. v. Lambert, 90 N.H. 507, 11 A. 2d 361, 127 A.L.R. 483, upon which the appellant mainly relies, for in that case, although the old car covered by the policy remained in the insured's garage, with license plates attached, after the purchase of the new car, it had not been used by the insured for several months prior thereto, because it was worn out, out of repair, and not fit to be driven on the public highway. It was upon these facts that the court held that a transfer of insurance took place under the replacement clause despite the retention of ownership and possession of the old automobile by the insured." (Emphasis added).

Another leading case which discusses the newly acquired automobile provision is *State Farm Mutual Insurance Co.* v. *Shaffer,* 108 S.E. 2d 49, 250 N.C. 49 (1959), which held that the vehicle alleged to be newly acquired must replace the car described in the policy and the allegedly replaced automobile covered by the policy must be disposed of or be incapable of further service at the time of the alleged replacement.

Mitcham and *Shaffer,* supra, were cited with approval in *Lynam* v. *Employers' Liability Assurance Corporation,* 218 F.Supp. 383 (1963), U.S.D.C. Dela., affd. 331 F. 2d 757, U.S.C.A. 3rd Circuit (1964), wherein the Court had under consideration a newly acquired automobile clause almost identical with that of the policy now under consideration. The District Court stated:

> "The Courts which have interpreted this clause in insurance policies are generally in accord with each other. The holdings are expressed very aptly in the following quotation:
>
> > " '* * * the replacement vehicle is one the ownership of which has been acquired after the issuance of the policy and during the policy period, and it must replace the car described in the policy, which must be disposed of or be incapable of further service at the time of the replacement.'
>
> "State Farm Mutual Automobile Ins. Co. v. Shaffer, 250 N.C. 45, 108 S.E. 2d 49, 54 (1959)."

The three cases mentioned above were cited in Respondent's original brief before the Court of Ap-

peals and in the Petitioners' brief, filed in the Court below, the following concession was made by them: "The general rule of law set forth in the several cases cited by State Farm as to the legal definition of a replacement automobile is identical with that used by the District Court and is, in effect, the law of all such cases, and facts of any particular case must be tested by that law."

Petitioners claim (Petition p. 20) that Kentucky has a "compulsory Financial Responsibility Law" and that there is "a body of law in several states holding that an insurer cannot interpose the defense of an alleged breach of the policy by the insured against innocent third parties" although Petitioners concede that Kentucky does allow such defenses. Actually we are not here concerned with a subsequent "breach" but whether or not there was insurance coverage in the first instance.

Kentucky does not have a "compulsory Financial Responsibility Law" but does have a Financial Responsibility Law (Kentucky Revised Statutes, Chapter 187) which was originally enacted in 1936.

The policy of Petitioner Yenowine, herein sued on, was not a policy which was issued to Petitioner Yenowine to comply with the Financial Responsibility Law because the Kentucky Court held in *Travelers Ins. Co.* v. *Boyd,* 312 Ky. 527, 228 S.W. 2d 421, that the Financial Responsibility Law of Kentucky *"acts in futuro"* and the law does not apply where the insured (in the case at bar Petitioner Yenowine) had not been re-

quired to furnish proof of her ability to respond in damages by taking out a liability policy covering an accident which might occur at a later date.

Kentucky Revised Statutes, Chapter 187, was amended in 1946 and the Court of Appeals of Kentucky in *Kentucky Farm Bureau Mut. Ins. Co.* v. *Miles,* Ky., 267 S.W. 2d 928 (1954) stated:

> "While the Financial Responsibility Law, which was amended in 1946, has not been construed by this Court, as it relates to the question involved, an act of 1936 in most respects identical to the one in controversy was interpreted in the Boyd case, cited above, and there we said (312 Ky. 527, 228 S.W. 2d 423): '* * * The whole spirit and tenor of the 1936 act is that it acts *in futuro.* It does not apply to the first accident nor is it applicable where the insured had not been required to furnish proof of his ability to respond in damages by taking out a liability policy covering an accident occurring thereafter. * * *'
>
> "(3) Had the accident occurred while the Act of 1936 was in force, it is clear appellant would be under no liability to either appellee or the insured. Appellee contends here, however, that the Act of 1946 applies not only to subsequent accidents but to any accident that may occur during the life of the policy. We disagree. A careful reading of the entire Act of 1946 discloses that it refers repeatedly to 'future accidents' and that, similarly to the act of 1936, it operates *in futuro.* Our interpretation of the Act of 1946 is the same as that arrived at in the United States District Court of Kentucky for the Western District in

State Auto Mutual Insurance Company v. Sinclair, 96 F.Supp. 267, and in Strode v. Commercial Casualty Insurance Company, 1952, 102 F.Supp. 240. We think each of these cases correctly decided the issue under discussion."

Petitioners find it necessary (Petition p. 20) to argue that based on "a moral consideration" they should have this case decided on exceptions to the general "rule of law under which this case was tried" and are entitled to claim an "added right", the "temporary retention" doctrine, such as was announced in *Brescoll v. Nationwide Mut. Ins. Co.,* 116 Ohio App. 537, 22 Ohio Ops. 2d 423, 189 N.E. 2d 173 (1961).

The instructions of the District Court on "replacement" (Record 66a) do not permit an automobile to qualify as a "replacement" if the old automobile is "temporarily retained" but it must be disposed of and in *Brescoll,* as opposed to the facts in the case at bar, the automobile covered by the policy was "out of service for repairs" and the Ohio Court noted that the described automobile, after its repair, was used only for transportation incidental to its sale, as distinguished from the same use to which the insured automobile had been put before the acquisition of the alleged replacement automobile.

Here, the Yenowine 1953 Plymouth automobile covered by the policy was not "out of service" at the time either the 1955 Plymouth or 1956 Plymouth was acquired and there is no contention by Petitioners that the 1953 Plymouth was, at the times mentioned, not

serviceable but it was, on the contrary, "in running order."

Maryland Casualty Company v. *Toney, et al.*, 178 Va. 196, 16 S.E. 2d 340 (1941), relied on by Petitioners actually supports Respondent's position and is in harmony with the decision of the Court of Appeals.

The facts in that case revealed that a 1937 Ford was covered by the policy and the insured decided to trade it for a 1937 Dodge. The trade was effected on January 31, 1939, and the next day the insured began negotiations for an exchange of the Dodge for a new 1939 Chevrolet. The Dodge was left in the possession of a dealer who, on February 13, 1939, advised the assured that the deal could not be effected, and the insured cancelled his order for the new Chevrolet. The Dodge was returned to the insured, and on February 17, 1939, the assured was involved in an accident while driving the Dodge automobile. The Court noted that there was some dispute in the testimony as to whether the insured had actually used the Dodge automobile while it was in the possession of the dealer although the insured apparently was privileged to do so.

The Virginia court held that the named insured had not notified the insurance company, within the ten day period prescribed by the policy. To offset this holding, the judgment creditor, Toney, contended that the ten day period did not begin to run until February 13, when the proposed exchange of the Dodge for the new Chevrolet had been called off, but the Court rejected this contention and *held that the*

Dodge was always owned by the named insured, and it was "capable of being used by him in the same manner as the Ford, which it replaced." This was another case contrary to the case now under consideration, *where the automobile described in the policy was disposed of.* (Emphasis added).

Another case of Petitioners, *Kaczmarck* v. *LaPerriere,* 337 Mich. 500, 60 N.W. 2d 327 (1953), does not support their position because in that case the named insured owned a Packard automobile which was insured, and on November 18, 1947, traded the Packard for an Oldsmobile, which he subsequently disposed of and acquired a Pontiac automobile on June 22, 1948. The Court held that the Pontiac qualified as a replacement, but noted specifically that the Oldsmobile was seldom operated and that the insured automobile had been disposed of. In the case at bar, Yenowine drove the 1955 Plymouth almost daily for four months, by her own admission, and the 1953 Plymouth, which was insured under the policy, had not been disposed of and was not disposed of until many months after the 1956 Plymouth was acquired and after the accident occurred.

Merchants Mutual Casualty Company v. *Lambert,* 90 N.H. 407, 11 A. 2d 361, 362, 363 (1940), cited on Page 19 of the Petition, does not apply because the New Hampshire court found as a matter of fact that the automobile described in the policy "was not used by the defendant Lambert in his business because the car was worn out, out of repair and not fit to be driven on the public highway."

Petitioners apparently realize that even their "added right" based on the "temporary retention" doctrine is without merit and, therefore, claim that Petitioner Edythe Yenowine discarded the 1953 Plymouth by inferring that she gave that automobile to her son who was about 17 years of age. We respectfully refer the Court to her testimony, concerning the alleged gift, which appears in the Record on Pages 44a and 46a. This testimony, viewed in its most charitable light, shows merely a possible intention of the Petitioner Yenowine to give the automobile to her son who testified (Record 59a-60a) that said Petitioner never did actually give the 1953 Plymouth to him and admitted that he "never did actually get the car."

Under Kentucky law, the intention of an alleged donor to make a gift without actually doing so is not sufficient to establish a gift, *Chipman's Adm'r.* v. *Gerlach,* 286 Ky. 157, 150 S.W. 2d 633 (1941), and in *Knox Adm'r.* v. *Trimble Adm'r.,* Ky., 324 S.W. 2d 130 (1959), the Kentucky Court of Appeals, with respect to the proof necessary to establish a gift, stated: (p. 132)

> "It is also noted that evidence of a gift inter vivos must be clear, convincing and free from reasonable doubt, Hale v. Hale, 189 Ky. 171, 224 S.W. 1078, and the burden of establishing the gift rests on the party claiming it, Combs v. Roark's Adm'r, 221 Ky. 679, 299 S.W. 576.
>
> "We have often said that to constitute a valid gift inter vivos, there must be a gratuitous and absolute transfer of the property from the donor

to the donee which takes effect immediately and is fully executed by delivery of the property by the donor and the acceptance thereof by the donee. Such gifts have no reference to the future, but must be immediate and absolute. *Furthermore, where the donor retains control and dominion of the property, the gift is of no effect because the delivery must be absolute.* Foxworthy v. Adams, 136 Ky. 403, 124 S.W. 381, 27 L.R.A., N.S., 308; and Goodan v. Goodan, 184 Ky. 79, 211 S.W. 423;" (Emphasis added).

Under the admitted facts, the 1953 automobile was at all pertinent times under the "control and dominion" of Petitioner Yenowine and even conceding, arguendo, that she did intend to give the automobile to her son, this was only a hope that at some future time the gift would be effected. A case in point is *Government Employees Co.* v. *Thomas,* Ky., 357 S.W. 2d 548 (1952), which involved the question of whether an automobile policy afforded coverage for a temporary substitute automobile which was specifically defined as one not owned by the insured.

There, the facts were that the named insured, Yoder, owned three vehicles, viz: a Sunbeam automobile, covered by the policy, a Harley-Davidson motorcycle, and a Chevrolet. Sometime before the accident the Sunbeam became disabled and was placed in a garage for repairs, but it was proven that about six weeks before the disablement Yoder had surrendered possession of the Chevrolet to Williams, who desired, in the future, to buy the automobile.

The Court noted that the testimony, at most, indicated that Yoder had surrendered the Chevrolet with the hope that Williams would buy it from him, and Williams testified that he and Yoder had verbally agreed that Williams was to buy the car and pay Yoder as soon as he could get the money, and that the Chevrolet would then become his. He also testified that after the verbal agreement was entered into, Yoder gave him possession of the Chevrolet. The Court sustained the insurance company's contention that the Chevrolet was not a non-owned automobile, but was owned by Yoder, and declared:

> "In addition, there had been no transfer of title under KRS 186.020 We recognize that compliance or non-compliance with the provisions of this statute is not conclusive of the ownership of a car. Higgenbotham v. Higginbotham's Trustee, 253 Ky. 218, 69 S.W. 2d 329; Moore v. Wilson, 230 Ky. 49, 18 S.W. 2d 873. However, the failure to comply, in itself, is of some evidentiary value which, when taken with the testimony, convinces us that the agreement expressed little more than the hope that some time in the future there might be a sale of the automobile."

In the case at bar the Bill of Sale to the 1953 Plymouth was, from the date of its acquisition in 1956, in the named insured, Yenowine, and remained so until she, admittedly, signed a Bill of Sale, in June 1962 and about a year after the accident, by which she transferred title.

2. THE DECISION OF THE COURT OF APPEALS IS NOT "CONTRARY TO HOW SUCH QUESTION HAS BEEN DECIDED BY ANOTHER FEDERAL COURT OF APPEALS" NOR IS IT CONTRARY TO KENTUCKY LAW.

Petitioners claim Certiorari should be granted because (1) the Decision of the Court of Appeals is contrary to the decision of the Fourth Circuit in *Mitcham* v. *Travelers Indemnity Co.*, 127 F. 2d 27, which was decided in 1942, and (2) the Sixth Circuit decision is contrary to the law of Kentucky as contained in *Brown* v. *State Farm Mutual Automobile Insurance Co.*, 306 S.W. 2d 836, Ky.. (1957).

Mitcham, supra, simply held that under the facts therein, there was no replacement of the automobile covered by the policy and the fact that notice of the alleged replacement was not given within the time prescribed by the policy was only "another insuperable objection" to recovery under the policy.

In other words, *Mitcham* recognized, as did the Court below, that there must be an actual replacement of which fact notice must be given, but *Mitcham* was not decided solely on the question of notice and that decision is entirely consonant with the decision of the Sixth Circuit. Under the Newly Acquired Automobile clause, supra, of the policy here involved, there must first be a replacement and if there is no replacement, notice, whether given or not, is of no effect and furthermore this case was presented to the Court below solely on the question of whether or not there was, in fact and law, a "replacement."

The Kentucky case, *Brown* v. *State Farm Mutual Automobile Insurance Co.,* which Petitioners now embrace, was not even relied upon by them either in the original brief or oral argument or in the Petition for Rehearing and Brown is not in conflict with the Decision of the Court of Appeals but actually supports it and is contra to Petitioners' claims.

There are no Kentucky cases factually in point but a Newly Acquired Automobile clause, almost identical with that now under consideration, was construed by the Kentucky Court of Appeals in *Brown,* wherein it was held that the Newly Acquired Automobile clause was not ambiguous and that it was necessary, under the clause, for the insured not only to notify the company but there must also be an actual replacement of the automobile described in the policy.

It was contended in *Brown* that the Newly Acquired Automobile clause should be most strongly construed against the assurer which is somewhat akin to Petitioners' present argument that they are entitled to some "added right" or should be able to rely upon some exceptions to the general rule of law regarding replacement vehicles.

The Kentucky Court of Appeals stated:

> "* * * By no stretch of the imagination did appellant comply with the terms of the policy when he attempted to substitute the Ford car he owned at the time the policy was issued for the Studebaker, covered by the policy. When the policy gave appellant the right to replace his Studebaker with a 'newly acquired automobile

> * * * * if the named insured notifies the company within thirty days following the date of its delivery to him,' certainly it was within the contemplation of the parties that the replacement must be a car the insured would acquire in the future and not one he owned at the time the policy was issued to him."

Petitioners are striving to have the 1956 Plymouth judicially determined to be a replacement of the 1953 Plymouth, covered by the policy, because Yenowine "attempted to substitute" or "attempted" to give the 1953 Plymouth automobile, covered by the policy, to her son which attempt did not constitute a disposal of the 1953 Plymouth under the law of Kentucky heretofore cited in this brief.

CONCLUSION

For the foregoing reasons, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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